NO. 79143-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP HICKS and RASHAD BABBS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas Felnagle, Judge
The Honorable Brian Tollefson, Judge

SUPPLEMENTAL BRIEF OF PETITIONER BABBS

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OTHER JURISDICTIONS

RULES, STATUTES AND OTHERS

A. SUPPLEMENTAL ISSUE STATEMENTS

1. In State v. Townsend,[1] this Court imposed a strict prohibition against informing jurors in non-capital cases that the death penalty is not an option. In petitioner's case, Division Two found that Babbs' trial attorney performed deficiently when he allowed the court to violate this prohibition, but held there can be no prejudice where jurors fail to convict on the most serious charge. Should this Court reject this *per se* rule of harmless error?

2. Petitioner is African-American. The State used a peremptory challenge to remove the only African-American juror slated to make it into the jury box. In State v. Rhodes,[2] and consistent with other jurisdictions, Division One held the State's removal of the only potential African-American juror establishes a prima facie case of discrimination. Division Two expressly rejected Rhodes and denied petitioner's claim. Did the exclusion of this juror violate appellant's equal protection rights?

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1 State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001).

2 State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996).

B. SUPPLEMENTAL STATEMENT OF THE CASE

The Pierce County Prosecutor charged Rashad Babbs and Phillip Hicks in count 1 with aggravated first-degree murder or, alternatively, first-degree felony murder (predicated on completed or attempted robbery) in connection with the shooting death of Chica Webber. Count 2 charged both men with attempted first-degree murder in connection with the shooting of Chica's husband, Jonathan Webber. CP 138-140; 2RP11-13.

The Webbers were shot by two men while walking in downtown Tacoma on the evening of March 22, 2001. 23RP 1164-1167, 1172-1178. Jonathan survived his injuries. 6RP 8, 28. Chica did not. 4RP 115; 8RP 27-28. Hicks admitted that he was one of the shooters, explaining to police that he was under the influence of PCP. 7RP 147-48, 151, 168-171. Police eventually arrested Babbs, believing him to be the second shooter. 9RP 60-62.

Whether Babbs was the second shooter was hotly contested at trial. Jonathan Webber was unable to identify him from a photomontage, instead indicating that another individual (who appeared somewhat Asian) looked most like the second shooter. 9RP 85-86. No one saw Babbs at the scene. In an attempt to overcome this evidentiary deficiency, the State introduced evidence he was seen with Hicks earlier on the day of the

shootings and a sweatshirt found near the shootings containing a mixture of DNA, some of which was consistent with Babbs' profile. 6RP 33-40; 9RP 157, 163-164; 25RP 1492-93.

At the first trial, jurors did not agree on the charge of aggravated murder, but instead convicted Babbs of first-degree felony murder. Jurors did not agree on attempted murder, either. CP 142, 146, 148; 14RP 19. But at a second trial, Babbs was convicted of that offense. CP 158.

1. Voir Dire at First Trial -- Death Penalty

During voir dire at the first trial, juror number 9 expressed concern that her religious beliefs could interfere with her ability to serve. 3RP 73. She was Catholic and feared the case might involve capital punishment. 3RP 73-74.

Upon hearing this concern, the court asked to see the attorneys at sidebar. 3RP 74. The court suggested that it tell the venire this case did not involve the death penalty, and defense counsel for both defendants indicated they had no objection. 4RP 3-4. In the presence of the entire venire, the court stated:

> Court: The thing I was talking to the attorneys about is I wanted to let all of you know with regard to this particular case, you heard me say it's an aggravated murder in the first degree case. This is not a death penalty case. So that issue is one that I suppose

could come in conflict with your religious beliefs, but it is not one that is at issue in this case. So that may remove some of your problem. I don't know, you need to tell me whether you think your religious beliefs might get in the way of your ability to follow the law as I give it to you. That's the area I have some concern about. Do you think you could follow the law as I give it to you?

Juror 9: Uh-huh, I think so.

Court: Okay. Any other concerns, Juror No. 9?

Juror 9: No, I just wanted to know.

3RP 74-75.

On appeal, citing State v. Townsend, Babbs argued that his trial attorney was ineffective when he permitted jurors to learn that his case did not involve the death penalty. See Brief of Appellant, at 21-24. Division Two agreed that this constituted deficient performance. Slip. Op., at 23. But the Court found that Babbs had not suffered prejudice, reasoning that the only risk associated with telling jurors the death penalty does not apply is that it will make them more likely to convict on the most serious charge. Because jurors did not convict Babbs of the most serious charge at the first trial (aggravated murder), the court found there could be no prejudice. Slip. Op., at 24.

2. Voir Dire at Second Trial -- *Batson*

The venire for Babbs' second trial had few African American members, a point defense counsel made when the State successfully removed an African-American man from the group for cause. 16RP 140, 142. In fact, the State successfully removed all African-American jurors from the panel ultimately selected when it used its second peremptory challenge against juror 9,[3] the only African-American slated to make it into the jury box. 18RP 490, 495.

Juror 9 said relatively little during voir dire. 18RP 491. In response to brief questioning by the prosecutor, she indicated she could follow the law on burden of proof and proof beyond a reasonable doubt and would not make it harder on the State simply because the case involved a serious charge. 17RP 394. She also stated that she worked for Social Security and -- in response to a hypothetical -- indicated she would be willing to fire one of her colleagues for misconduct were she in a supervisory role. 17RP 452. In response to questions from the defense, juror 9 indicated she would not have a problem deciding the defendants' guilt or innocence. 17RP 424. Nor would she hold Babbs' decision not to

[3] While this juror and the juror from the first trial who prompted the discussion of the death penalty were both assigned the number 9, they were separate individuals.

testify against him. 17RP 476. And she indicated she could separate sympathy for the victims from what happened in the case. 17RP 460.

The court ruled the defense had established a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and required the prosecutor to provide race neutral reasons for his removal of the lone African-American. 18RP 496. The prosecutor offered three: (1) juror 9 had a master's in education (and the prosecutor believed educators are "forgiving, nurturing types"), (2) she was a social worker (an alleged "red flag for a prosecutor"), and (3) a friend or relative had been arrested and served jail time. 18RP 496-97. The court denied the Batson challenge without expressly addressing or determining the credibility of these reasons. 18RP 498.

On appeal, Division Two never reached the legitimacy of the State's reasons, either. Instead, the Court held that where the defendant is African-American, removal of the only African-American on the panel is insufficient to create a prima facie case of racial discrimination. Slip Op., at 14. Division Two expressly rejected Division One's contrary opinion in Rhodes. Slip Op., at 15 n.6.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR ALLOWING THE COURT TO TELL JURORS THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

The law is settled in Washington. "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a non-capital first-degree murder case, it is error to tell jurors the death penalty will not be imposed. Townsend, 142 Wn.2d at 846-47; State v. Murphy, 86 Wn. App. 667, 668, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998). This is a "strict prohibition." Townsend, 142 Wn.2d at 846.

Division Two properly found that defense counsel performed deficiently when he allowed jurors in the first trial to learn the death penalty was not a sentencing option. In Townsend, this Court stated, "There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner." Townsend, 142 Wn.2d at 847. This Court continued:

> Rather than giving jurors information about the penalty in a noncapital case, we believe that voir dire should be used to screen out jurors who would allow punishment to influence their determination of guilt or innocence and then, through instructions, jurors should be advised that they are to disregard punishment. This should satisfy the concerns raised by the State [that jurors will acquit if they fear the penalty may be imposed]. We see no reason to create an exception for noncapital murder cases.

Townsend, 142 Wn.2d at 847.

Recently, in State v. Mason, ___ Wn.2d ___, ___ P.3d. ___ (WL 2051541, filed July 19, 2007), Division One attempted to carve out an exception to Townsend's "strict prohibition," holding that trial courts may tell jurors the death penalty does not apply if a juror raises the subject. This Court disagreed and reaffirmed the prohibition. Based on Townsend and Mason, Division Two properly found Babbs' attorney deficient.

But the court erred when it found there was no prejudice because jurors failed to convict on the most serious charge (aggravated murder). As this Court recognized in Townsend, "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, 142 Wn.2d at 847. These concerns are not unique to the most serious offense charged. They apply whether the charge is aggravated murder or "merely" another version of first-degree murder (here, first-degree felony murder predicated on robbery).

The record of Babbs' first trial supports a finding of prejudice. The absence of the death penalty was a recurring topic during voir dire. The Court instructed jurors on it. 3RP 74-75. The prosecutor mentioned it. 3RP 154-55. Both defense attorneys mentioned it. 4RP 43, 64. And the prosecutor alluded to it again during closing argument. 11RP 31 ("at least [Hicks] has a life. At least he can choose whether or not he's going to grow old to a ripe old age.").

In fact, surprisingly, when Babbs' attorney raised the subject with another juror, he used it to *assuage* the individual's fear about convicting an innocent man. Juror 33 said, "I recall it was a law professor that said to

me in a conversation we had, he says, 'I'd rather see 10 guilty people on the street than one innocent person in the electric chair.'" 4RP 63-64. Counsel answered, "Okay. All right. Again, we are not heading toward the death penalty in this case, but I understand." 4RP 64. The juror responded, "Right. Of course." 4RP 64. The State excused juror 33. 4RP 79. But both the defense and the State allowed juror 9 to remain. And all jurors were present for these comments. 4RP 75-82.

Jurors would have struggled with sufficiency of the evidence against Babbs because (1) *no one* saw him at the scene; (2) Jonathan Webber believed the person with Hicks was partly of Asian ancestry and indicated that someone else's photo looked more like the person than Babbs' photo did; (3) a prosecution witness who knew Babbs well testified that he did not recognize the person with Hicks the day of the shooting; and (4) a description of the shooter differed from Babbs in height and clothing, including his shoes. See Brief of Appellant, at 23-24.

Jurors otherwise inclined to hold out for acquittal on the first-degree felony murder charge would have necessarily been less careful knowing that Babbs would not be killed. Jurors who entertained reasonable doubt that he was the second shooter would have felt more comfortable compromising and ultimately voting for conviction on that charge. See Townsend, 142

Wn.2d at 847. Because there is a reasonable probability jurors were affected -- sufficient to undermine confidence in the outcome -- Division Two erred in finding that Babbs did not suffer prejudice.

Cases in which this error has been deemed harmless are distinguishable. In State v. Murphy, Division One found that instructing jurors in this manner was harmless where the jury did not convict the defendant of first-degree murder. Murphy, 86 Wn. App. at 672-73. In Babbs' case, of course, the jury convicted him of first-degree murder.

In Townsend, the defendant merely argued that absence of the death penalty may have affected the jury's deliberations on premeditation for first-degree murder. He did not argue the remaining elements were affected. And because there was overwhelming evidence of premeditation, this Court had little difficulty concluding the instruction had no impact at trial. Townsend, 142 Wn.2d at 848-49. In contrast, there was good reason to doubt that Babbs was the second shooter and therefore good reason to find he was not guilty of first-degree murder. The erroneous instruction was far more likely to impact deliberations in his case.[4]

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[4] In Mason, this Court found the instruction harmless where defense counsel made only a "lukewarm" objection and, in fact, may have encouraged the judge to instruct jurors that the penalty did not apply. Mason, WL 2051541, at 10. This analysis appears to be more akin to waiver or invited error than harmless error. In any event, unlike Babbs

Babbs was denied effective representation. His case should be remanded for a new trial on first-degree felony murder.

2. THE STATE'S EXCLUSION OF THE LONE AFRICAN-AMERICAN JUROR AT BABBS' SECOND TRIAL VIOLATED EQUAL PROTECTION.

More than 125 years ago, the United States Supreme Court held that an African-American defendant is denied equal protection when the State purposefully excludes members of the defendant's race from the jury chosen to try his case.[5] Strauder v. West Virginia, 10 Otto 303, 100 U.S. 303, 25 L. Ed. 664 (1880). A century later, in Batson v. Kentucky, the Court said:

> That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In Strauder, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

Batson, 476 U.S. at 85 (citation omitted).

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and Townsend, Mason did not claim ineffective assistance of counsel on appeal and therefore the analysis differs.

[5] U.S. Const., amend. 14 provides in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In Batson, the Court continued these "unceasing efforts" by making it clear the Equal Protection Clause does not require "proof of repeated striking of blacks over a number of cases" to establish a constitutional violation. Batson, 476 U.S. at 92. Rather, "[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" Batson, 476 U.S. at 95 (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 n.14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). "For evidentiary requirements to dictate that 'several must suffer discrimination' before one could object . . . would be inconsistent with the promise of equal protection to all." Batson, 476 U.S. at 95 (quoting McCray v. New York, 461 U.S. 961, 965, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983) (Marshall, J., dissenting from denial of certiorari)). "The standard we adopt . . . is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." Batson, 476 U.S. at 99 n.22 (emphasis added).

A three-part test determines whether the State's use of peremptory challenges violates equal protection. The defendant must first make a prima facie case of purposeful discrimination. Such a case exists where the challenge is exercised against a member of a "constitutionally cognizable

racial group," and "other relevant circumstances" raise the inference that the challenge was based upon membership in the group. Rhodes, 82 Wn. App. at 196 (quoting Burch, 65 Wn. App. at 840). These "relevant circumstances" are many, and include the prosecutor's questions and statements during voir dire, race of the defendant and victim, and similarities between those struck and those left on the jury. State v. Wright, 78 Wn. App. 93, 99-100, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995).

Once the defendant establishes a prima facie case, the burden then shifts to the State to "articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. A simple denial of discriminatory intent will not suffice. Rhodes, 82 Wn. App. at 196. The State's "neutral explanation must be 'clear and reasonably specific.'" State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357 (1992) (citations omitted).

Finally, the trial court must decide if there was purposeful discrimination. Rhodes, 82 Wn. App. at 196. This necessarily involves an evaluation of the prosecutor's demeanor and credibility. The trial court's ruling on the question of racial motivation is upheld unless clearly erroneous. Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Overruling the trial court, Division Two found that Babbs had not established a prima facie case of intentional discrimination. This was error. In State v. Rhodes, Division One properly held that the State's dismissal of the only eligible African-American establishes a prima facie case of discriminatory intent. Rhodes, 82 Wn. App. at 201 (citing United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 1487, 134 L. Ed. 2d 687 (1996) ("the significance [of a challenge to a black juror] may differ if the venire consists mostly of blacks or of whites")); see also Wright, 78 Wn. App. at 101 ("The fact that the deputy prosecutor dismissed the only eligible African-American juror is a factor which could raise an inference of discrimination.").

The Supreme Court of Ohio explained succinctly why Batson does not require multiple challenges against African-Americans before the Equal Protection Clause is triggered:

> The existence of a pattern of discriminatory strikes is *not* a prerequisite either to finding a prima facie case in step one of the *Batson* analysis or to finding actual discrimination in step three. Such a rule would ignore *Batson's* requirement that the trial court consider *all* the circumstances in determining whether racial discrimination occurred. It would also mean that no *Batson* challenge could succeed unless the prosecutor challenged more than one member of the group in question. Such a rule would license prosecutors to exercise one illegal peremptory strike per trial. The law of equal protection does not allow "one free bite."

State v. White, 85 Ohio St. 3d 433, 709 N.E.2d 140, 147-48 (Ohio) (emphasis in original), cert. denied, 528 U.S. 938 (1999).

Consistent with Rhodes, other jurisdictions have also held that the defendant establishes a prima facie case under Batson when the prosecution uses a peremptory challenge against the sole remaining prospective juror of the defendant's race. See United States v. Chalan, 812 F.2d 1302, 1312-1314 (10th Cir. 1987), cert. denied, 488 U.S. 983 (1988); United States v. Roan Eagle, 867 F.2d 436, 440-41 (8th Cir.), cert. denied, 490 U.S. 1028 (1989); United States v. Shelby, 26 M.J. 921, 923-24 (C.M.R.), review denied, 27 M.J. 476 (1988); Acklin v. State, 319 Ark. 363, 896 S.W.2d 423, 424 (Ark. 1995); Pearson v. State, 514 So.2d 374, 376 (Fla. Dist. Ct. App. 1987), review dismissed, 525 So.2d 881 (1988); Durham v. State, 185 Ga. App. 163, 363 S.E.2d 610 (Ga. Ct. App. 1988); McCormick v. State, 803 N.E.2d 1108, 1111 (Ind. 2004).

In several other jurisdictions, courts have held this *may* establish a prima facie case of discriminatory intent. These courts reject a per se rule and instead leave the decision to the trial judge's broad discretion. See, e.g., United States v. Horsley, 864 F.2d 1543, 1545-46 (11th Cir. 1989); United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir.), cert. denied,

513 U.S. 891 (1994); United States v. Clemons, 843 F.2d 741, 746-48 (3rd Cir.), cert. denied, 488 U.S. 835 (1988).

This Court should follow those jurisdictions holding that exclusion of the only individual of defendant's race establishes a prima facie case of intentional discrimination. This rule is consistent with Batson's declaration that the Equal Protection Clause does not immunize "'[a] single invidiously discriminatory governmental act.'" Batson, 476 U.S. at 95 (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 n.14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). The Batson framework was "designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." Batson, 476 U.S. at 99 n.22 (emphasis added). Requiring the State to offer a race-neutral reason when it strikes the only member of defendant's race ensures this goal is met.

At the very least, this Court should follow those jurisdictions holding that exclusion of the only individual of the defendant's race *may* establish a prima facie case. In Babbs' case, the trial judge could have based his finding on the fact juror 9 was the last African-American, the prosecutor's demeanor while addressing this juror, that juror 9 answered all of the prosecutor's questions in a manner indicating she could be fair

but was nonetheless removed, and/or additional "other relevant circumstances" not revealed by a cold transcript. But whatever the reasons, these jurisdictions recognize the trial judge is in the best position to make this determination and that determination will be upheld on appeal when it involves removal of the lone African-American from the venire.

A trial court's determination that a prima facie case has been established will not be set aside unless clearly erroneous. State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). There was no such showing here. Indeed, on appeal the State had not even challenged the trial court's prima facie finding. See Brief of Respondent, at 46-50.

Moreover, once the trial judge rules on intentional discrimination, "the preliminary prima facie case is unnecessary." Luvene, 127 Wn.2d at 699 (citing Hernandez, 500 U.S. at 359; accord McCormick, 803 N.E.2d at 1111 (Indiana); White, 709 N.E.2d at 148 (Ohio). But see Wright, 78 Wn. App. at 101 (predating Luvene and rejecting notion that race-neutral explanation renders prima facie finding moot).

Nonetheless, Division Two revisited the prima facie finding, rejected Division One's opinion in Rhodes and held, as a matter of law, that removal of the only eligible African-American juror does not establish

a prima facie case of racial discrimination. This was incorrect procedurally and substantively.

Once Babbs established a prima facie case, the prosecutor was required to provide race-neutral reasons for excluding juror 9. He complied with that requirement. "An explanation is neutral unless a discriminatory intent is inherent therein." Burch, 65 Wn. App. at 840 (citing Hernandez, 500 U.S. 432). Looking solely at the face of the prosecutor's reasons, they do not necessarily rely on race for their legitimacy.

But that is not the end of the inquiry. Step three is very much at issue. Steps two and three cannot be collapsed into a single step. State v. Evans, 100 Wn. App. 757, 769, 998 P.2d 373 (2000) (citing Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). Under step three, the court must decide whether the prosecutor's race-neutral reasons are to be believed. McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000); Rhodes, 82 Wn. App. at 196-97. This is not a duty the trial court can abdicate by simply accepting the prosecution's stated reasons at face value. McClain, 217 F.3d at 1223.

The trial court's failure to make this ultimate determination usually requires remand for further findings. McClain, 217 F.3d at 1223. But where the reasons clearly do not survive appellate scrutiny, the appellate court can

simply reverse. See McClain, 217 F.2d at 1224; Burch, 65 Wn. App. at 844.

At Babbs' trial, the court utterly failed to apply the third step of the analysis. Rather than address the prosecutor's stated reasons, the court simply said, "Okay. The Batson challenge is denied." 18RP 498. Had the court taken the time to consider the reasons, there was but one conclusion -- they were not supported by the record. They were pretextual. And any finding of non-discriminatory intent would have been clearly erroneous.

As the Ninth Circuit has recognized, "[w]here the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." McClain, 217 F.3d at 1221. Neither trial courts nor appellate courts are bound to accept "neutral" reasons that are either unsupported or refuted by the record. And "[t]he fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason." McClain, 217 F.3d at 1221; accord Kesser v. Cambra, 465 F.3d 351, 359-360 (9th Cir. 2006).

At Babbs' trial, the prosecutor proffered three excuses: (1) juror 9 had a master's in education (and the prosecutor believed educators are "forgiving, nurturing types"); (2) she was a social worker (a "red flag"); and (3) a friend or relative had been arrested and served jail time. 18RP 496-97.

Examining each reason separately shows that they do not survive scrutiny. As to the first reason, the prosecutor never once asked how juror 9's advanced education degree might affect her tendencies for forgiveness. The closest he came was when he asked her whether she could fire her co-worker who had engaged in misconduct. Her response was unequivocally reassuring, as she declared that she could and would because it "comes with the job." 17RP 452. Thus, the record refutes this stated reason for juror 9's removal. There was nothing unduly forgiving about her.

The second reason fares no better. The prosecutor indicated that juror 9's social work was a "red flag." Unfortunately, he did not elaborate further. Perhaps the prosecutor believed this to be further evidence of an unacceptable willingness to forgive. But juror 9's unflinching readiness to fire a co-worker for misconduct, and each of her other answers during voir dire, undercuts any contrary stereotype.

The third reason also fails. That juror 9 had a friend or relative who was arrested and served jail time is meaningless without more. It is just as likely juror 9 had good feelings about this experience as bad. Had the prosecutor bothered to ask, juror 9 may have indicated that her friend/relative committed the crime, was treated fairly, and is better off today. Juror 9 may have been sympathetic to the prosecution in that matter.

"[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." Miller-El v. Dretke, 545 U.S. 231, 246, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (quoting Ex Parte Travis, 776 So.2d 874, 881 (Ala. 2000)). There is certainly nothing in juror 9's answers to the questions she *was* asked indicating ill will toward the State based on the event.

The prosecutor's three race-neutral reasons are either not supported by the record or affirmatively contradicted by it. The court erred in not assessing those reasons at trial. The record reveals they were pretextual. For that reason, Babbs' attempted murder conviction must be reversed.

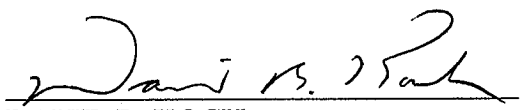
D. CONCLUSION

Babbs respectfully requests that this Court reverse the decision of the Court of Appeals, and remand his case for a new trial.

DATED this 30th day of July, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. RASHAD BABBS, Appellant.	)	NO. 79143-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JULY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER BABBS** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY 2007.

X Patrick Mayovsky